MICHAEL RODAK, JR., CL

No. 79-1734

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ROBERT PARRATT AND FRANCES LUGENBILL, *Petitioners,*

v.

BERT TAYLOR, JR., *Respondent.*

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF THE STATE OF HAWAII AMICUS CURIAE IN SUPPORT OF PETITIONERS

WAYNE MINAMI
Attorney General of Hawaii

JAMES H. DANNENBERG
Deputy Attorney General Of Hawaii
Counsel Of Record

Department Of The Attorney General
Hawaii State Capitol
Honolulu, Hawaii 96813
(808) 548-4740

Attorneys For Amicus Curiae

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES iii

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF ARGUMENT 5

ARGUMENT 6

I. While Simple Negligence May Sustain Section 1983 Liability In Some Circumstances, It Is Insufficient To Establish Liability In The Present Case 6

A. History and Theory of Section 1983 Liability 6

1. Theories of Culpability 6

2. Section 1983 From Reconstruction to *Monroe* v. *Pape* 8

3. *Monroe* v. *Pape* and Its Impact 10

B. The Standard of Culpability Depends Upon the Particular Constitutional Right Implicated 13

1. Negligence May Sustain Liability in Some Areas 13

2. Negligence May Be Insufficient to Sustain Liability in Some Areas 13

3. A Flexible Standard Is Required for Fourteenth Amendment Due Process Claims, But Negligence Will Generally Not Sustain Section 1983 Liability Where Property Rights Are Involved .. 14

4. Where the Governmental Relationship Between the Parties Is Only Incidental to the Negligent Deprivation, the Proper Remedy Is a State Tort Claim Rather Than a Section 1983 Action ... 15

Table of Contents Continued

PAGE

II. The Existence of Adequate State Tort Claims Remedies Satisfies the Requirements of Procedural Due Process 18

A. Due Process Does Not Always Require Predeprivation Review Where Liberty or Property Interests Are Implicated 18

B. Where Property Interests Are Involved, Post-deprivation Remedies Will Generally Be Adequate 20

C. Where Deprivation of Property Is Unintentional, Post-deprivation Review Satisfies Due Process Requirements 21

CONCLUSION 22

TABLE OF AUTHORITIES

CASES: PAGE

Arnett v. *Kennedy*, 416 U.S. 134 (1974) 20

Baker v. *McCollan*, 443 U.S. 137 (1979)..... 6

Baxter v. *Palmigiano*, 425 U.S. 308 (1976)..... 4

Bell v. *Wolfish*, 441 U.S. 520 (1979) 4

Board of Regents v. *Roth*, 408 U.S. 564 (1972)..... 15

Bonner v. *Coughlin* 517 F.2d 1311 (Ca 7, 1975), mod. en banc 545 U.S. 565 (Ca 7, 1976) *cert. den.*, 435 U.S. 932 ..... 6, 7, 8, 15, 20

Cafeteria and Restaurant Workers Union v. *McElroy*, 367 U.S. 886 (1961)..... 19

Clappier v. *Flynn*, 605 F.2d 519 (Ca 10, 1979) 7

Coleman v. *Johnston*, 247 F.2d 273 (Ca 7, 1957) 10

Estelle v. *Gamble*, 429 U.S. 97 (1976) 4, 6, 7, 14

Hague v.*CIO*, 307 U.S. 496 (1939)..... 9

Ingraham v. *Wright*, 430 U.S. 651 (1977) 19, 20

Jackson v. *Duke*, 259 F.2d 3 (CA 5, 1958)..... 10

Joint Anti-Fascist Refugee Committee v. *McGrath*, 341 U.S. 123 (1951) 18

Jones v. *Diamond*, 594 F.2d 997 (CA 5, 1979) 7

Jones v. *North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977) 4

Kimbrough v. *O'Neill*, 545 F.2d 1059 (CA 7, 1976) 17

Lynch v. *Household Fin. Co.* 405 U.S. 538 (1972) 4

McCollum v. *Mayfield*, 130 F. Supp. 112 (ND Ca., 1955) 10

McCray v. Maryland, 456 F.2d 1 (CA 4, 1972)..... 7, 13

Meachum v. *Fano*, 427 U.S. 215 (1976) 4

Monroe v. *Pape*, 365 U.S. 167 (1961).. 2, 5, 9, 10, 11, 12, 17

Myers v. *Anderson*, 238 U.S. 368 (1915)..... 9

Table of Authorities Continued

CASES:	PAGE
Nixon v. *Herndon*, 273 U.S. 536 (1927)	9
Paul v. *Davis*, 424 U.S. 693 (1976)	12, 14
Penn v. *Oliver*, 351 F.Supp. 1292 (ED Va., 1972)	7
Perry v. *Sindermann* 408 U.S 593 (1972)	15
Picking v. *Pennsylvania R.R.*, 151 F.2d 240 (CA 3, 1945)	10
Preiser v. *Rodriguez*, 411 U.S. 475 (1973)	4
Procunier v. *Navarette*, 434 U.S. 555 (1978)	6, 13
Rummel v. *Estelle*, _____ U.S. _____, 63 L.Ed.2d 382 (1980)	4, 14
Screws v. *United States*, 325 U.S. 91 (1945)	9, 11
Secret v. *Brierton*, 584 F.2d 823, 47 ALR Fed. 1 (CA 7, 1978)	21
Sibron v. *New York*, 392 U.S. 41 (1968)	13
Snowden v. *Hughes*, 321 U.S. 1 (1944)	14
Snyder v. *Blankenship*, 473 F. Supp. 1208 (WD Va., 1979)	17
Trop v. *Dulles*, 356 U.S. 86 (1958)	14
United States v. *Classic*, 313 U.S. 299 (1941)	9, 11
Watson v. *Ault*, 525 F.2d 886 (CA 5, 1976)	3
Welch v. *Evans*, 402 F.Supp. (ED Va., 1975)	13
Whirl v. *Kern*, 407 F.2d 781 (CA 5, 1969), *cert. den.* 396 U.S. 901	7, 11
Williams v. *Field*, 416 F.2d 483 (CA 9, 1969)	14
Wolff v. *McDonnell*, 418 U.S. 539 (1974)	4
Wood v. *Strickland*, 420 U.S. 308 (1975)	13

Table of Authorities Continued

CONSTITUTIONAL AND STATUTORY PROVISIONS: PAGE

First Amendment to the Constitution of the United States 9, 13

Fourth Amendment to the Constitution of the United States 10, 13

Sixth Amendment to the Constitution of the United States 13

Eighth Amendment to the Constitution of the United States 7, 14

Fourteenth Amendment to the Constitution of the United States 5, 9, 10, 11, 12, 14, 15, 18, 19, 20, 21

Fifteenth Amendment to the Constitution of the United States 9

42 U.S.C. 1983 ..... *passim*

18 U.S.C. 241 ..... 9, 11

18 U.S.C. 242 9

28 U.S.C. 1915 (d) 3

OTHER AUTHORITIES:

Rule 12 (b)(6), Federal Rules of Civil Procedure 13

Rule 42 (4), Rules of the Supreme Court 1

Abdalian and Lachman, Federal Courts and Small Claims: §1983 Actions and §1983, 33 Arkansas L.Rev. 91 (1979) 7

Administrative Office of the United States Courts, 1980 Report of the Director 2

Aldisert, Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload, 1973 Law and Soc. Order 557 4

Comment, The Evolution of the State of Mind Requirement of Section 1983, 47 Tulane L.Rev. 870 (1963) . 7

Table of Authorities Continued

OTHER AUTHORITIES: PAGE

Friedman, A History of American Law, 1973 9

Kirkpatrick, Defining a Constitutional Tort Under Section 1983: The State-of-Mind Requirement, 46 U. Cincinnati L. Rev. 45 (1977)..... 7, 8, 13, 15

McCormack, Federalism and Section 1983: Limitations on Judicial Enforcement of Constitutional Protections, Part I, 60 Va. L. Rev. 1 (1974) 7, 8

Nahmod, Section 1983 and the "Background" of Tort Liability, 50 Indiana L.J. 5 (1974) 7, 8

Note, Actionability of Negligence under Section 1983 and the Eighth Amendment, 127 U. Pa. L.Rev. 523 (1978) 7

Note, Prisoner Property Deprivations: Section 1983 and the Fourteenth Amendment, 52 Indiana L.J. 257 (1976) 7

Prisoner Civil Rights Committee, Federal Judicial Center, Recommended Procedures for Handling Prisoner Civil Rights Cases in Federal Courts (1977) 3

Shapo, Constituional Tort: *Monroe* v. *Pape*, and the Frontiers Beyond, 60 Northwestern U. L. Rev. 277 (1965)..... 7, 9, 10

Turner, When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts, 92 Harvard L.Rev. 610 (1979) 2, 3

Virginia Commission on Constitutional Government, The Reconstruction Amendments Debates (1967) 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 79-1734

ROBERT PARRATT AND FRANCES LUGENBILL, *Petitioners,*

v.

BERT TAYLOR, JR., *Respondent.*

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

---

BRIEF OF THE STATE OF HAWAII AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICUS CURIAE

The State of Hawaii, by Wayne Minami, Attorney General, and James H. Dannenberg, Deputy Attorney General, submits this *amicus curiae* brief in support of the Petitioners in the above-entitled cause, pursuant to Rule 42(4) of the Rules of the Supreme Court. The State of Hawaii believes that, for the reasons stated herein, this Court should reverse the judgment of the Court of Appeals.

The facts presented in this case are deceptively simple. Because of the arguably negligent conduct of prison officials,

a Nebraska inmate failed to receive a $23.57 hobby kit ordered prepaid by mail; he was authorized to receive the kit, but it was lost or stolen after officials, in violation of their own policies, allowed another inmate to receive and sign for it. The inmate then filed this action pursuant to 42 U.S.C. §1983 on grounds that he was denied property by state officials without due process of law.

These facts, however uncomplicated they may be, frame at least two issues of profound and perplexing sublety, both of which are of interest to the State of Hawaii and to the states in general: 1) the extent of interplay between Constitutional and tort doctrines, especially whether simple negligence may form the basis of a judgment under §1983; and 2) the possibility that extant state tort remedies may, at least in certain circumstances, be sufficient to satisfy procedural due process requirements under the Fourteenth Amendment.

The impact of these issues upon the states, as well as the federal courts, is significant. It is no exaggeration to say that in the two decades since this Court handed down its watershed decision in *Monroe* v. *Pape*, 365 U.S. 167 (1961), there has been an explosion of §1983 suits filed in the District Courts. State prisoner suits in 1980 accounted for half of all civil rights filings. The increase in such suits in recent years has been great: in 1966, the first year in which such statistics were kept, there were 218 filings; in 1980 there were 12,397, an increase of over 5,500 per cent.[1] In 1977 these cases accounted for 6.5 per cent of total civil filings; by 1980, the percentage had increased to 7%.[2]

That this volume of cases has made its impact on the federal court system is clear, although the magnitude of the

---

[1] See, Turner, *When Prisoners Sue: A Study of Prisoner Section 1983 Suits in the Federal Courts*, 92 Harvard Law Review 610 (1979); Administrative Office of the United States Courts, 1980 Annual Report of the Director.

[2] 1980 Annual Report, tables 19, 21, 28.

impact is less certain. The burden of numbers alone is subject to varying interpretations. One commentator has stated:

> The impact of prisoner section 1983 cases on the efficient functioning of the federal district courts is not nearly as great as the numbers might indicate. The burden is relatively light because such a large proportion of the cases are screened out and summarily dismissed before they get underway, because court appearances and trials are rare, and because prisoner cases are not particularly complex as compared to other types of federal litigation.[3]

Yet he went on to say:

> On the other hand, pro se litigation is undoubtedly a problem for judicial administration. The burden on the court is mainly in screening such pro se cases, not in trying them. Relatively few prison cases can be settled, primarily because meaningful negotiations between prisoners acting pro se and states' attorneys are practically impossible. Thus unlike other civil litigation, some court action is required on almost all the cases. The court action occurs in the initial section 1915(d) review, on a defendant's motion to dismiss or for summary judgment, or on a periodic house cleaning when old cases are dismissed for lack of prosecution.[4]

The major problem, of course, is sorting the relatively few meritorious claims from the large number of meritless ones. The proliferation of suits, by virtue of mere volume, may tax the ability to screen effectively, and there is always a danger that valid claims may not be acted upon.[5]

The burden of prisoner civil rights litigation weighs heavily upon the states as well, both in terms of increased pressures

---

[3] *Turner, supra* at 637.

[4] *Id.* at 637-638

[5] See, e.g. *Watson* v. *Ault*, 525 F.2d 886, 890 (CA 5, 1976), discussing the difficulty encountered attempting "to winnow out the wheat from the unusual amount of chaff." See also Prisoner Civil Rights Committee, Federal Judicial Center, *Recommended Procedures for Handling Prisoner Civil Rights Cases in Federal Courts* (1977).

on state attorney general offices and in terms of the added demands on the time of prison officials. These considerations may not by themselves justify arbitrary and artificial limitations upon civil rights litigation, but they constitute the context in which the states' arguments regarding the present case are made.

Your amicus believes that the trend in this area has been to expand the bases of liability, in spite of recent rulings.[6] Much of this expansion has taken place in the lower courts, primarily because this court has not yet ruled definitively on the issues raised in the instant case. There is much confusion afoot as regards the present scope of §1983, and this confusion seems magnified by the sheer volume of prisoner cases. Rather than pose the traditional "floodgate" argument, which may discourage a sustained logical assessment of section 1983, one might better look to protecting and re-affirming its *Constitutional* underpinnings while trying to weed out "garden variety torts" traditionally litigated in State courts.[7] Limitations on civil rights actions should be reasoned and rational, rather than merely expedient, but it appears that, in the face of mushrooming numbers of apparently minor claims, some limitation must be made.

---

[6] E.g., *Preiser* v. *Rodriguez*, 411 U.S. 475 (1973); *Estelle* v. *Gamble*, 429 U.S. 97 (1976); *Wolff* v. *McDonnell*, 418 U.S. 539 (1974); *Meachum* v. *Fano*, 427 U.S. 215 (1976); *Baxter* v. *Palmigiano*, 425 U.S. 308 (1976); *Jones* v. *North Carolina Prisoners' Labor Union*, 433 U.S. 119 (1977); *Bell* v. *Wolfish*, 441 U.S. 520 (1979); *Rummel* v. *Estelle*, _____ U.S. _____, 63 L.Ed.2d 382 (1980).

[7] Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and The Federal Case Load*, 1973 Law and Soc. Ord. 557, 566. Judge Aldisert also argued that the flood of property claims after *Lynch* v. *Household Fin. Co.*, 405 U.S. 538 (1972), "has made the Federal Court a nickel and dime court." *Id.* at 569.

SUMMARY OF ARGUMENT

A. Negligence.

The expansion of Section 1983 litigation since *Monroe* v. *Pape*, 365 U.S. 167 (1961) has been dramatic. By specifically eliminating the requirement of "wilful" conduct, by adopting for civil cases an expansive definition of "color of law," and by holding that Section 1983 cases were to be viewed "against a background of tort," the Court invited a wide range of suits. Theories have abounded regarding the relationship between constitutional and tort liabilities, with courts and commentators generally disagreeing about whether the minimum standard for culpability should be negligence. The establishment of an inflexible standard would be illogical in light of the purposes of Section 1983: the level of required culpability should be related to the specific constitutional violation alleged. Where the basis of the claim is the Due Process Clause of the Fourteenth Amendment, without reference to an incorporated provision of the Bill of Rights, a similar flexible standard should be observed: where property interests are implicated under the Due Process Clause, unintentional conduct would normally not suffice. Further, within this framework, where the harm is caused by a state agent in a way unrelated to governmental function or purpose, the harm is not a "misuse of power" and not actionable under Section 1983, at least where negligently caused; in the prison context, where harm from negligent conduct flows from a "housekeeping" rather then a "governmental" relationship between inmate and official, only a state-remedied tort interest is stated, rather then a cause of action under Section 1983.

B. State tort remedies as due process.

While in many cases due process requires that a hearing precede state action resulting in "grievous loss", such pre-deprivation remedies are not universally required — either for "liberty" or "property" interests. Property interests especially may be susceptible to post-deprivation review, since the harm is neither irreparable nor final. Where such property interests

are negligently infringed upon, the only kind of review possible is post-deprivation, and the existence of adequate state claims procedures satisfies requirements of due process.

ARGUMENT

I. While Simple Negligence May Sustain Section 1983 Liability In Some Circumstances, It Is Insufficient To Establish Liability In The Present Case

A. History and Theory of Section 1983 Liability

The question of whether simple negligence may form the basis for liability under Section 1983 has been before this Court on at least two prior occasions, and, on both occasions, the Court declined to give a definitive answer.[8] Most recently, in *Baker* v. *McCollan*, 443 U.S. 137, 139-140 (1979), the Court, speaking through Justice Rehnquist, gave some indication of the complexity of this issue:

> Having been around this track once before in Procunier, supra, we have come to the conclusion that the question whether an allegation of simple negligence is sufficient to state a cause of action under §1983 is more elusive than it appears at first blush. It may well not be susceptible of a uniform answer across the entire spectrum of conceivable constitutional violations which might be the subject of a §1983 action.

1. Theories of Culpability

This is not to say that various courts and commentators have not attempted to find a path through the forest of §1983 causes of action.[9] Quite the contrary: the forest has many

---

[8] *Procunier* v. *Navarette*, 434 U.S. 555 (1978); *Baker* v. *McCollan*, 443 U.S. 137 (1979).

[9] See, e.g., *Bonner* v. *Coughlin*, 545 F.2d. 565 (CA 7,1976) (simple negligence not actionable); *Bonner* v. *Coughlin, supra* at 569-578 (dissent by Judge Swygert arguing against relevance of state of mind); *Estelle* v. *Gamble*, 429 U.S. 97 (1976) (requirement of

paths through it, but unfortunately they lead in different directions. Answers proposed regarding levels of culpability under section 1983 have ranged from strict liability for constitutional deprivation[10] to the acceptance of the negligence standard across the board[11] to a uniform rejection of negligence as an acceptable standard[12] to an establishment of an "outrageousness" standard.[13] Cutting across the grain of

---

wanton, reckless or grossly negligent conduct in Eighth Amendment medical treatment case); *McCray* v. *Maryland*, 456 F.2d 1 (CA 4, 1972) (allowing recovery on negligence standard); *Penn* v. *Oliver*, 351 F. Supp. 1292 (E.D.Va. 1972) (negligence insufficient for Eighth Amendment claim); *Clappier* v. *Flynn*, 605 F.2d 519 (CA 10, 1979) (same).

Among the commentaries are Abdalian and Lachman, *Federal Courts and Small Claims: Prisoners'* § 1983 *Actions and* § 1983, 33 Arkansas L.Rev. 91 (1979); Note, Actionability of Negligence under *Section* 1983 *and the Eighth Amendment*, 127 U. Pennsylvania L.Rev. 533 (1978); Kirkpatrick, *Defining a Constitutional Tort Under Section* 1983: *The State-of-Mind Requirement*, 46 U. Cincinnati L.Rev. 45 (1977); Note, *Prisoner Property Deprivations: Section 1983 and the Fourteenth Amendment*, 52 Indiana L.J. 257 (1976); McCormack, *Federalism and Section* 1983: *Limitations on Judicial Enforcement of Constitutional Protections, Part I*, 60 Va.L.Rev. 1 (1974); Nahmad, *Section* 1983 *and the "Background" of Tort Liability*, 50 Indiana L.J. 5 (1974); Comment, *The Evolution of the State of Mind Requirement of Section* 1983, 47 Tulane L.Rev. 870 (1973); Shapo, *Constitutional Tort: Monroe* v. *Pape, and the Frontiers Beyond*, 60 Northwestern U.L.Rev. 277 (1965).

[10] *Whirl* v. *Kern*, 407 F.2d 781 (CA 5, 1969), *cert. denied*, 396 U.S. 901; later overturned in *Jones* v. *Diamond*, 594 F.2d 997, 1004 (CA 5, 1979).

[11] *McCray* v. *Maryland*, 456 F.2d 1 (CA 4, 1972).

[12] *Bonner* v. *Coughlin*, 545 F.2d 565 (CA 7, 1976); *McCormack, supra*.

[13] *Shapo, supra*, at 327.

these approaches are those which posit more flexible typologies of liability, either by suggesting that violations of different constitutional provisions require variable standards of culpability,[14] or by finding different standards of culpability depending upon the relative roles of the parties.[15]

The most promising path through the forest is one that looks first at the nature of the constitutional violation and then to the underlying tort principles. It seems clear that the presence or absence of any particular level of culpable activity is only tangentially important to a finding of liability. Negligence should not be arbitrarily enshrined as the common denominator of liability, nor should any other standard. The goal of screening out meritless cases should not encourage expedient solutions to difficult problems.

2. Section 1983 From Reconstruction to Monroe v. Pape

Section 1983 is basically unchanged from its original form:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.[16]

Section 1983 was originally designed to protect Southern Blacks from the depredations of the Ku Klux Klan, which waged its well-documented campaigns of terror against a backdrop of inaction, indifference, or impotence on the part of state officials. The act's primary function was to enforce the rights of Southern Blacks where the states could or would

---

[14] *Kirkpatrick, supra* at 64-67; *Nahmad, supra* at 25.

[15] *Bonner* v. *Coughlin, supra* (dissent of Judge Swygert).

[16] Rev. Stat. § 1979 (1875), 42 U.S.C. § 1983.

not.[17] The earliest cases utilized the Fifteenth Amendment[18] but in 1927 the Court held in favor of Black Texas voters by invoking the Fourteenth Amendment: Justice Holmes remarked that the Fourteenth Amendment, "while it applies to all, was passed, as we know, with a special intent to protect the blacks from discrimination against them." *Nixon* v. *Herndon*, 273 U.S. 536 (1927).

It was not until the period of the Second World War, however, that the act was applied outside the area of racial discrimination. The landmark decision was *Hague* v. *CIO*, 307 U.s. 496 (1939), dealing with the First Amendment. During the next few years the Court was to hand down several additional decisions which would in turn lay the foundations for the great expansion of section 1983 jurisdiction to come in more recent years.[19] Two cases dealing with the criminal analogs to section 1983, now Title 18 U.S.C. 241 and 242, completely changed the direction of juridicial inquiry into the nature of what it meant to act "under color of" state law, which had until this time been assumed to mean acting pursuant to state statute. In *United States* v. *Classic*, 313 U.S. 299, 326 (1941) the Court held that:

> Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken "under color of" state law.

In *Screws* v. *United States*, 325 U.S. 91 (1945), a case involving the fatal beating of a Black man by a Georgia sheriff, the court further expanded the idea that the civil rights acts could

---

[17] The legislative history of the act has been well documented in *Monroe* v. *Pape*, 365 U.S. 167 (1961); see also *Shapo, supra* 279-282; Virginia Commission on Constitutional Government, *The Reconstruction Amendment Debates* 1967; Friedman, *A History of American Law*, 299-300, 440-443 (1973).

[18] See, *e.g. Myers* v. *Anderson*, 238 U.S. 368 (1915).

[19] For a detailed examination of this period, see *Shapo, supra* at 282-287.

extend to conduct not specifically prescribed by statute. Justice Douglas found that this was not a case "where an officer not authorized to act nevertheless takes action," but that instead:

> Here the state officers were authorized to make an arrest and to take such steps as were necessary to make the arrest effective. They acted without authority only in the sense that they used excessive force in making the arrest effective. It is clear that under "color" of law means under "pretense" of law. The acts of officers in the ambit of their personal pursuits are plainly excluded.

3. Monroe v. Pape and Its Impact

It took fifteen more years for this Court to extend this usage of the "under color of" concept to the civil area, and the impact of that decision, *Monroe* v. *Pape*, 365 U.S. 167 (1961), can hardly be exaggerated.[20] The plaintiffs in *Monroe* endured unconscionable and brutal treatment at the hands of Chicago police officers. The Court, speaking again through Justice Douglas, held that Fourth Amendment violations, made applicable to the states by the Due Process Clause of the Fourteenth Amendment, stated a cause of action under section 1983. The opinion discussed what it saw as the three main aims of the act:

> *First*, it might, of course, override certain kinds of state laws. . . .
>
> *Second*, it provided a remedy where state law was inadequate. . . .
>
> The *third* aim was to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice. *Id.* at 173-174.

---

[20] The lower federal courts explored this area during 1945-61. See, e.g. *Shapo, supra* at 287-294; *Picking* v *Pennsylvania R.R.*, 151 F.2d 240 (CA 3, 1945); *Coleman* v. *Johnston*, 247 F.2d 273 (CA 7, 1957); *Jackson* v. *Duke*, 259 F.2d 3 (CA 5, 1958), *McCollum* v. *Mayfield*, 130 F.Supp. 112 (N.D. Cal., 1955).

And further, after discussing the turmoil of the Reconstruction era:

> It is abundantly clear that one reason the legislation was passed was to afford a federal right in Federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by state agencies. *Id.* at 180.

In upholding the civil liability of the police officers in *Monroe*, the Court made at least two major points. First, the Court adopted the broad definition of what constitutes action "under color of" state law from *Classic*. Second, the Court distinguished the level of culpability required under Section 1983 from that of 18 U.S.C. 241, a criminal statute requiring "wilful" conduct:

> In the *Screws* case we dealt with a statute that imposed criminal penalties for acts "wilfully" done. We construed that word in its setting to mean the doing of an act with "a specific intent to deprive a person of a federal right." 325 U.S. at 103. We do not think that gloss should be placed on §1979 [now §1983] which we have here. The word "wilfully" does not appear in §1979. Moreover, §1979 provided a civil remedy, while in the *Screws* case we dealt with a criminal law challenged on the ground of vagueness. *Section 1979 should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions. Id.* at 187 [emphasis added].

It is the "background of tort" language that has proved so troublesome to courts since *Monroe*. The threshhold question is whether this language eliminated any state of mind requirement and allowed liability to be predicated on negligence (or less) rather than on the basis of more culpable behavior.[21]

---

[21] See *Whirl* v. *Kern*, 407 F.2d 781 (CA 5), *cert. denied*, 396 U.S. 901 (1969)

A major concern is that section 1983 may, read broadly, appear to encompass virtually the entire field of torts. The difficulty is in balancing the important Constitutional issues with the tort issues so as not to simply duplicate state remedies. As Justice Harlan said, concurring in *Monroe*, *supra* at 193:

> One can agree with my Brother Frankfurter, in dissent, that Congress had no intention of taking over the whole field of ordinary state torts and crimes. . . .

It has been demonstrated that the underlying purposes of section 1983 all looked to situations where state remedies were subject to question, either in substance or practice. The evolution from Reconstruction to *Monroe* is understandable, given the facts of *Monroe*. It is less easy to place the kind of actions described herein within that same context. The temptation to include all tortious conduct by State officials has drawn the attention of this court on more than one occasion since *Monroe*. In *Paul* v. *Davis*, 424 U.S. 693 (1976), Justice Rehnquist suggested limitations to the tort background:

> If respondent's view is to prevail, a person arrested by law enforcement officers who announce that they believe such person to be responsible for a particular crime in order to calm the fears of an aroused populace, presumably obtains a claim against such officers under §1983. And since it is surely far more clear from the language of the Fourteenth Amendment that "life" is protected against state deprivation than it is that reputation is protected against state injury, it would be difficult to see why the survivors of an innocent bystander mistakenly shot by a policeman or negligently killed by a sheriff driving a government vehicle, would not have claims equally cognizable under §1983.
>
> It is hard to perceive any logical stopping place to such a line of reasoning. Respondent's construction would seem almost necessarily to result in every legally cognizable injury which may have been inflicted by a state official acting under "color of law" establishing a violation of the Fourteenth Amendment. We think it would come as a great surprise to those who drafted and

shepherded the adoption of that Amendment to learn that it worked such a result, and a study of our decisions convinces us they do not support the construction urged by respondent.

B. The Standard Of Culpability Depends Upon The Particular Constitutional Right Implicated

1. Negligence May Sustain Liability in Some Areas

The threshhold level of culpability depends on the particular constitutional violation alleged. Negligence may be sufficient to sustain a section 1983 cause of action for some violations but not for others.[22]

One area in which negligence may arguably sustain liability is that of the Fourth Amendment. Probable cause requirements underlying the reasonableness of searches and seizures do not require specific intent or malice for liability.[23] Negligent conduct by State officials has also been found actionable where the right of access to courts has been violated.[24] A cause of action may also be stated where Sixth or First Amendment rights have been negligently violated.

2. Negligence May Be Insufficient to Sustain Liability in Some Areas

On the other hand, other areas do not lend themselves easily to analyses in terms of negligence. Equal protection arguments, for example, generally look to a wrongful motive

---

[22] Avoiding Rule 12(b) (6), Federal Rules of Civil Procedure, challenge does not mean that defendants' negligence can pierce immunity. *Procunier* v. *Navarette*, 434 U.S. 555 (1978); *Wood* v. *Strickland*, 420 U.S. 308 (1975). Section 1983 also encompasses injunctive and declaratory relief as well.

[23] See *Kirkpatrick*, *supra* at 64-65; *Sibron* v. *New York*, 392 U.S. 41 (1968).

[24] *McCray* v. *Maryland*, 456 F.2d 1 (CA 4, 1972). (Clerk negligently impeded filing of petition); *Welch* v. *Evans*, 402 F.Supp. 468 (E.D. Va., 1975).

as a necessary condition of liability.[25] Likewise, Eighth Amendment claims will not be satisfied by a showing of mere negligence; *Estelle* v. *Gamble*, 429 U.S. 97 (1976), indicated that the standard was at least a showing of "deliberate indifference."[26]

3. *A Flexible Standard Is Required For Fourteenth Amendment Due Process Claims, But Negligence Will Generally Not Sustain Section 1983 Liability Where Property Rights Are Involved*

More difficult is the standard of culpability for claims brought directly under the Due Process Clause of the Fourteenth Amendment without any reference to an incorporated provision of the Bill of Rights. The wording of the Due Process clause is broad, covering deprivation of "life, liberty or property," but, at least insofar as section 1983 liability is concerned, the lack of concrete language defining the precise nature of the constitutional issues (e.g., "right to counsel," "cruel and unusual punishment," "unreasonable search and seizure") has predisposed the courts against broad interpretation. For example, the Court in *Paul* v. *Davis*, 424 U.S. 693, 700 (1976) refused to recognize a constitutionally protected interest in one's reputation:

> Respondent, however, has pointed to no specific constitutional guarantee safeguarding the interest he asserts has been invaded [in this case, property interests]. Rather he apparently believes that the Fourteenth Amendment's Due Process Clause should *ex proprio vigore* extend to him a right to be free of injury wherever the State may be characterized as the tort-feasor. But such a reading would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States. We have noted the "constitutional shoals" that confront any attempt to

---

[25] See, e.g. *Snowden* v. *Hughes*, 321 U.S. 1 (1944); *Williams* v. *Field*, 416 F.2d 483 (CA 9, 1969).

[26] See also *Rummel* v. *Estelle*, _____U.S. _____ 63 L.Ed.2d 382 (1980); *Trop* v. *Dulles*, 356 U.S. 86 (1958).

> derive from congressional civil rights statutes a body of general federal tort law [citation omitted]; *a fortiori* the porcedural guarantees of the Due Process Clause cannot be a source for such law.

Property interests are generally defined in accordance with State law.[27] Yet, as one commentator has suggested:

> The primary interest intended to be protected by the due process clause is not property, but procedure. The clause is intended to restrain arbitrary action by the state. Therefore, inadvertant or unknowing conduct by a state officer would generally not infringe the procedural right of the individual party that the Fourteenth Amendment is designed to protect.[28]

4. *Where the Governmental Relationship Between the Parties Is Only Incidental To the Negligent Deprivation, the Proper Remedy Is a State Tort Claim Rather Than A Section 1983 Action*

Although most lower courts seem to hold that negligence will not suffice in due process property cases,[29] such a rule should not be inflexible. The real issue is the scope of the particular constitutional duty. It is useful in this regard to attempt a characterization of the nature of the state actor's conduct. This analysis was suggested by Judge Swygert's dissenting opinion in *Bonner* v. *Coughlin*, 545 F.2d 565 (CA 7, 1976), *cert. denied* 435 U.S. 932, rejecting a negligence standard while looking at whether state power was misused:

> When the state employs a person and authorizes him to carry out particular governmental functions, not all of his activities are directed solely to that objective. Nonetheless, the nature of his second by second activities would not be exactly the same were it not for his function of state authority. *Some differentiation between those activities directed toward accomplishing the state objectives and those which are incidental or individual must be made.* A police officer driving a squad car might

---

[27] *Perry* v. *Sindermann*, 408 U.S. 593 (1972); *Board of Regents* v. *Roth*, 408 U.S. 564 (1972).

[28] *Kirkpatrick*, *supra* at 66.

[29] E.g. *Bonner* v. *Coughlin*, 545 F.2d 565 (CA 7, 1976).

> negligently pass through a stop sign and injure a pedestrian in an intersection, but in this regard he should be viewed no differently than an ordinary civilian driver. It is true that but for his state authority he might not have been driving at that time or place and he may have been carrying out his duties at the time — scanning the streets for a robbery suspect, for example — but I believe that such an instance cannot fairly be characterized as a "misuse of power" which occured while acting "under color of state law." *Id.* at 574-575.

Judge Swygert then applied this analysis to prisoner lawsuits:

> This reasoning can be applied to the prison setting. *First, a distinction must be made between those activities of prison personnel which partake of the governmental role of a prison system and those remaining activities which flow inexorably from the fact of confinement.* Activities falling into the first category always occur under color of state law, but only certain of the activities in the latter group can be so characterized.
>
> The activities in the inherently governmental category include those having to do with security, discipline, and commerce between inmates and persons outside the prison. Also encompassed within this category is the regulation of a prisoner's First Amendment activities undertaken in a manner consistent with the state's authority to incarcerate. Consequently, the search of a cell, the censorship of mail, and the process whereby a prisoner is considered for discipline for alleged infractions of prison rules would all be regarded as occuring under color of state law. If during the course of these kinds of activities a deprivation of a constitutional right occurs, a section 1983 action should be maintainable.
>
> The analysis for activities within the second classification is not as clear. Prison personnel act as custodians, providing food, shelter, exercise facilities, safety measures, and a host of other incidentals. These services must be offered as a consequence of the primary fact of imprisonment. A prisoner cannot, for example, call a private physician when he is ill and those in charge of his confinement must therefore assume that responsibility. [Citation omitted.] *Nothing inherently or peculiarly governmental occurs in the exercise of these functions.* *Id.* at 575. [Emphasis added.]

In this second, "housekeeping," category, Judge Swygert argued that simple negligence should not give rise to a Section 1983 cause of action. It is into this catetory that Respondent Taylor's claim of negligent package handling falls. The negligence of the responsible state officials as regards the routine handling of mailed property does nothing more than state a Nebraska tort claim. Similarly, one court reasoned that where a prisoner was injured because the state failed to adequately maintain a dishwasher, such a claim did not reach constitutional proportions:

> Furthermore, Snyder's alleged injury is not of the type where the risk of harm was increased substantially because he was a state prisoner. . . . The mere fortuity that the accident occured in a prison does not vest petitioner Snyder with a right to federal adjudication of what is essentially a state common law tort claim, and petitioner's allegation of a slip and fall incident makes out nothing more than a common law tort.

Snyder v. *Blackenship*, 473 F.Supp. 1208, 1211-1212, (W.D. Va. 1979).

Respondent has not suffered as a result of misuse of state power as it was conceived either by the drafters of the Civil Rights Act of 1871 or under the rationale adhered to in *Monroe* v. *Pape*, *supra*.[10] Here, however, this may not have been the case with intentional action. The cause of action arose solely because of alleged negligence, and, given the basically non-governmental function involved (handling a package), the only logical redress is in a state tort claim action.

---

[10] See *Kimbrough* v. *O'Neil*, 545 F.2d 1059 (CA 7, 1976) (with concurring opinion of Judge Swygert).

II. The Existence Of Adequate State Tort Claims Remedies Satisfies The Requirements Of Procedural Due Process

A. Due Process Does Not Always Require Predeprivation Review Where Liberty or Property Interests Are Implicated

The second major issue raised in this case concerns the relationship between the availability of state tort remedies and the requirements of due process under the Fourteenth Amendment. Petitioners have argued quite correctly that under the circumstances respondent has not been deprived of due process but has, in fact, been afforded the opportunity for due process by virtue of Nebraska's state tort claims remedies.

The touchstone of procedural due process may be characterized as fundamental fairness, and no particular set of procedures is mandated for all situations. As Justice Frankfurter stated in *Joint Anti-Fascist Committee* v. *McGrath*, 341 U.S. 123 (1951) (concurring opinion):

> The requirement of "due process" is not a fair-weather or timid assurance. It must be respected in periods of calm and in times of trouble; it protects aliens as well as citizens. But "due process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, "due process" cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, "due process" is compounded of history reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess. Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process.

Id. at 162-163.

The consideration of what process is due depends upon the particular circumstances. The court further held in *Cafeteria and Restaurant Workers Union* v. *McElroy*, 376 U.S. 886, 895, that:

> [C]onsideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.

While it is true that in many instances due process requires a hearing prior to deprivation of liberty or property, such is not invariably the rule. The Fourteenth Amendment does not forbid the taking of life, liberty, or property — only the taking without due process of law. In some situations it is either impossible or impractical to hold a prior hearing, and in those circumstances due process must necessarily entail post-deprivation review.[31]

This court dealt with the issue of whether state tort remedies could satisfy due process in *Ingraham* v. *Wright*, 430 U.S. 651 (1977). In that case the argument that due process mandated prior review of school corporal punishment was rejected:

> In those cases where severe punishment is contemplated, the available civil and criminal sanctions for abuse — considered in light of the openness of the school environment — afford significant protection against unjustified corporal punishment. [Citation omitted.] Teachers and school authorities are unlikely to inflict corporal punishment unnecessarily or excessively when a possible consequence of doing so is the institution of civil or criminal proceedings against them. *Id.* at 678. . . .[T]he Fourteenth Amendment's requirement of procedural due process is satisfied by Florida's preservation of common law constraints and remedies.

Id. at 683.

---

[31] See dissenting opinion of Justice Stevens in *Ingraham* v. *Wright*, 430 U.S. 651, 701 (1977) (including citations at note 1).

B. Where Property Interests Are Involved, Post-deprivation Remedies Will Generally Be Adequate.

Ingraham was a 5-4 decision, with vigorous dissents by Justices White and Stevens. Even the dissenting opinions seem to favor appellants' arguments in the present case. In arguing that state tort remedies do not satisfy due process requirements for excessive infliction of corporal punishment, Justice White made the following point:

> Second, and more important, even if the student could sue for good faith error in the infliction of punishment, the lawsuite occurs after the punishment has been finally imposed. *The infliction of pain is final and irreparable; it cannot be undone* in a *subsequent proceeding*. [*Id.* at 695; emphasis added.]

Taking of property, at least of the type involved in this action, can indeed be "undone."

This distinction between liberty and property interests was suggested in Justice Stevens' dissent:

> When only an invasion of property interest is involved, there is a greater likelihood that damages award will make a person completely whole than when an invasion of the individual's interest in freedom from bodily restraint and punishment has occurred. *In the property context, therefore, frequently a postdeprivation state remedy may be all the process that the Fourteenth Amendment requires*. [*Id.* at 701; emphasis added.][32]

This echoes Justice Stevens' (then Circuit Judge Stevens) original panel opinion in *Bonner* v. *Coughlin*, 517 F.2d 1311 (1975), a case with facts similar to the present case.

> It seems to us that there is an important difference between a challenge in an established state procedure as lacking in due process and a property damage claim arising out of the misconduct of state officers. In the former situation the facts satisfy the most literal reading of the

---

[32] See also *Arnett* v. *Kenedy*, 416 U.S. 134, 178-179 (1974).

> Fourteenth Amendment's prohibition against "State" deprivations of property; in the latter situation, however, even though there is action "under color of" state law sufficient to bring the amendment into play, the state action is not necessarily complete. For in a case such as this the law of Illinois provides, in substance, that the palintiff is entitled to be made whole for any loss of property occasioned by the unauthorized conduct of the prison guards. We may reasonably conclude, therefore, that the existence of an adequate state remedy to redress property damage inflicted by state officers avoids the conclusion that there has been any constitutional deprivation of property without due process of law within the meaning of the Fourteenth Amendment.
>
> This is not to suggest that the plaintiff in a § 1983 action must exhaust his state remedies before seeking federal relief. Rather, it seems to us that the availability of an adequate state remedy for a simple property damage claim avoids any constitutional violation.[33]

C. Where Deprivation Of Property Is Unintentional, Post-deprivation Review Satisfies Due Process Requirements

The fact that respondent complains of negligent rather than purposive conduct is also significant.

> Here, however, there is no possible way in which a state could afford a hearing to a citizen in advance of an unanticipated negligent act by a state agent; necessarily-unless the Due Process Clause is construed to impose an impossible standard — the post incident machinery must be sufficient to meet the demands of due process.

Id. at 1319, n. 24. In the present case, where a negligent property deprivation is alleged, a prior hearing was both impossible and unrequired. The state tort remedy was available and adequate, and as such afforded due process.

---

[33] See *Secret* v. *Brierton*, 584 F.2d 823, 47 ALR Fed 1 (CA 7, 1978).

CONCLUSION

For the foregoing reasons, your *Amicus*, The State of Hawaii, respectfully urges that this Court reverse the decision of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

WAYNE MINAMI
Attorney General of Hawaii

JAMES H. DANNENBERG
Deputy Attorney General of Hawaii
Counsel of Record

Attorneys for Amicus Curiae

Department of the Attorney General
Hawaii State Capitol
415 South Beretania Street
Honolulu, Hawaii 96813
(808) 548-4740